

Consideration for Preliminary Adoption of Amendments to Address Piers, Marinas, Lawful Nonconforming Uses and Related Matters in Navigable Waters; Administrative Cause No. 08-009L

Presented for consideration as to preliminary adoption are proposed amendments to the rules which govern navigable waterways, particularly relating to the evaluation of piers and lawful nonconforming uses. Please see Exhibit "A". Many of the concepts for navigable waterways are adapted from existing standards for public freshwater lakes. Important new substantive standards are also proposed. Numerous policy questions are presented.

This proposal was considered by the Advisory Council, as part of a package which also addressed public freshwater lakes, during its April 9, 2008 meeting. The Advisory Council bifurcated the proposal into separate rule proposals pertaining to navigable waters (312 IAC 6) and to public freshwater lakes (312 IAC 11). With respect to navigable waters, the Advisory Council made amendments from the original draft and recommended the rule proposal to the Natural Resources Commission for May preliminary adoption. The Advisory Council conditioned the recommendation, however, on the premise a DNR consensus would be developed pertaining to the treatment of reservoirs listed in 312 IAC 6-4-5(d). The consensus had not yet been achieved in May, so the Commission remanded the proposal to resolve this issue. During its June meeting, the Advisory Council additionally suggested the DNR modify standards to keep the navigable water rules parallel to amendments being proposed for public freshwater lakes. These modifications were anticipated from an ongoing review of the lakes' rules by the Lake Management Work Group.

With respect to reservoirs, a DNR consensus was achieved by which the review processes generally applicable to navigable waters would also govern the listed reservoirs, but with the qualification that the DNR division managing a reservoir could impose supplemental requirements. For examples, supplemental requirements may be derived from DNR property management rules or from agreements between the DNR and a federal agency, most notably the U.S. Army Corps of Engineers, pertaining reservoir management. This DNR consensus was shared with the Advisory Council during its August meeting, and no objections were raised.

The proposed amendments to the rules governing navigable waters, pertaining to piers and other matters, are presented for consideration as to preliminary adoption. These include the DNR consensus for 312 IAC 6-4-5(d) and modifications to keep the navigable waters proposals reasonably parallel with those for public freshwater lakes.

EXHIBIT “A”

TITLE 312 NATURAL RESOURCES COMMISSION

Proposed Rule LSA Document #08-

DIGEST

Amends 312 IAC 6 governing the placement of structures in navigable waters to provide new standards pertaining to the placement of piers. Incorporates by reference a nonrule policy document, assisting with the identification of riparian zones, for use as guidance in performing the functions of IC 14-29-1 (sometimes called the “Navigable Waters Act”). Provides standards for lawful nonconforming uses. Makes technical changes. Effective 30 days after filing with the Publisher.

312 IAC 6-1-1 Application of article

Authority: IC 14-10-2-4; IC 14-29-1-8

Affected: IC 14-19-1-1; IC 14-21-1; IC 14-28-1; IC 14-29-1; IC 14-29-3; IC 14-29-4-5; IC 14-34; IC 14-37

Sec. 1. (a) This article governs an activity relative to a license, and an activity for which a license is required whether or not a permit is sought or held, under IC 14-19-1-1, IC 14-29-1, IC 14-29-3, IC 14-29-4 (if IC 14-29-4-5(2) applies), or another statute administered by the department as a result of a waterway being navigable.

(b) In the absence of a contrary state boundary, the line of demarcation for a navigable waterway is the ordinary high watermark. **If the water level on a navigable waterway is modified by a lawful control structure, the line of demarcation for purposes of licensure and enforcement is determined based upon the ordinary high watermark with the control structure in place.**

(c) A separate license is not required under this article and IC 14-29-1 for an activity permitted under IC 14-21-1, IC 14-28-1, IC 14-29-3, IC 14-34, or IC 14-37.

(d) Compliance with this article satisfies the licensing requirements for IC 14-29-1, IC 14-29-3, and IC 14-29-4 (if IC 14-29-4-5(2) applies).

(e) Before issuing a license under IC 14-21-1, IC 14-28-1, IC 14-34, or IC 14-37, the department shall apply the requirements of IC 14-29-1-8 and this article with respect to an activity within a navigable waterway.

(f) Before issuing a license under this rule, the department shall consider the following:

(1) The public trust ~~doctrine~~.

(2) The likely impact upon the applicant and other affected persons, including the accretion or erosion of sand or sediments.

(g) A separate license is not required under IC 14-29-1-8 for an activity which is exempted from licensing by IC 14-29-1-8(e).

(Natural Resources Commission; 312 IAC 6-1-1; filed Sep 11, 1997, 8:50 a.m.: 21 IR 366; readopted filed Jul 28, 2003, 12:00 p.m.: 27 IR 286)

312 IAC 6-1-4 Determination of Riparian Zones

Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-26-1-8

Affected: IC 14-15; IC 14-29-1

Sec. 4. If a determination of riparian boundaries is reasonably required for the performance of functions under IC 14-29-1 and this article, the department (or the commission on administrative review) shall consider as guidance “Riparian Zones within Public Freshwater Lakes and Navigable Waters” as published by the Legislative Services Agency at DIN: 20080116-IR-312080013NRA (January 16, 2008). (*Natural Resources Commission; 312 IAC 6-1-4*)

312 IAC 6-1-5 Lawful nonconforming uses

Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-26-1-8

Affected: IC 14-15; IC 14-29-1

Sec. 5. (a) A structure or facility that was lawfully placed before the effective date of a provision of:

(1) IC 14-29-1-8; or

(2) a section of this article;

which would be unlawful if placed after that date, is eligible for qualification under this section as a lawful nonconforming use.

(b) This subsection governs the establishment of a lawful nonconforming use as follows:

(1) A person who claims a lawful nonconforming use has the burden of proof for establishing:

(A) the existence of the use; and

(B) that the use was lawful;

when the new or amended statutory or rule section became effective. Except as provided in subdivision (2), a use must have been in existence when the new or amended section became effective and not merely at some time before it became effective.

(2) If a rule section that governs the placement of a temporary structure becomes effective outside the boating season, but a temporary structure was used during the previous boating season, the use is considered to have been in existence when the section became effective. As used in this subdivision, the boating season is from April 1 through October 31.

(3) The department may consider the following documentation in determining the existence of a lawful nonconforming use:

(A) Ground level or aerial photographs.

(B) Blueprints or engineering drawings.

(C) Pier installation company records.

(D) Inventories of piers that are nonconforming uses. These inventories shall be maintained by the department's division of law enforcement at the district headquarters for the district in which the structure is located.

(E) CAD drawings.

(F) Deeds, plats, and similar recorded documents.

(G) Adjudications by the commission or by a court, including those determining the intent or consequence of an easement.

(H) GPS units or range finders.

(I) USDA documentation.

(J) County GIS programs and documentation.

(K) Statements from riparian owners and others familiar with the site may also be considered, but a determination may not be based solely on those statements.

(4) A person may deliver a written request and supporting documentation in support of a claim to any lawful nonconforming use that arises under IC 14-29-1-8 or this article. A person who does not deliver a request under this subdivision is not prohibited from asserting the benefits of a lawful nonconforming use as an affirmative defense or otherwise in a proceeding under IC 4-21.5.

(5) The department shall provide notice under IC 4-21.5-3-5 of a determination that a structure qualifies or does not qualify as a lawful nonconforming use under subdivision (4).

(6) The department shall maintain a public file or files to memorialize any determinations under this subsection. The department may include in the file a determination that a structure qualified or did not qualify as a lawful nonconforming use even if the determination was made before the effective date of this subsection.

(c) This subsection governs the maintenance of or modification to a lawful nonconforming use as follows:

(1) Except as provided in subdivision (2), a lawful nonconforming use may be maintained, but the use cannot be modified or repaired unless a person satisfies the requirements of IC 14-29-1 and this article that are in effect at the time of the modification or repair. In performing modification or repair under this subdivision, the:

(A) location;

(B) size; and

(C) configuration;

of the use must be maintained.

(2) The department may authorize a modification or repair to a lawful nonconforming use if it determines that the resulting change to the:

(A) location;

(B) size; or

(C) configuration;

would better serve a public right or a vested right, as protected by IC 14-29-1 or this article, than does the existing lawful nonconforming use.

(d) This subsection governs the removal of a lawful nonconforming use as follows:

(1) The director or the director's designee may order the removal of a lawful nonconforming use if the structure or facility is either of the following:

(A) A nuisance that is likely to pose a significant adverse affect to any of the following:

(i) Navigability.

(ii) The environment.

(ii) The enjoyment of life or property.

(iv) The public trust.

(B) Abandoned.

(C) Modified in a manner for which a license is required under IC 14-29-1 or this article, but for which no license has been obtained.

(2) The department has the burden of proof to establish a lawful nonconforming use should be removed under this subsection.

(3) A structure adversely affects navigability under subdivision (1)(A)(i) if the structure is any of the following:

(A) Extended or located more than one hundred (100) feet from the ordinary high watermark of the waterway.

(B) Submerged or otherwise obscured from the view of a boater or other person using a lake.

(C) In a derelict condition. A structure is in a derelict condition if:

(i) so neglected by the owner that it has become ineffective for the intended purposes; or

(ii) following a reasonable inquiry, the owner of the structure cannot be identified.

(4) Generally, a use is abandoned if not exercised for a period in excess of one (1) year. A person may, however, present evidence of special factors that would reasonably excuse a failure to maintain the use. These factors include the following:

(A) Pending litigation relating to the lawful nonconforming use.

(B) Unusual environmental conditions.

(e) IC 4-21.5-3-8 controls an order issued under subsection (d) unless an emergency exists, in which event IC 4-21.5-4 applies.

(f) Nothing in this rule affects the department's right to seek injunctive or other relief under IC 14-29-1 or another applicable law. (*Natural Resources Commission; 312 IAC 6-1-5*)

312 IAC 6-2-3.7 "Group pier" defined

Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-29-1-8

Affected: IC 14

Sec. 3.7. "Group pier" means a pier that is subject to IC 14-29-1 and provides docking space for any of the following:

(1) At least five (5) separate property owners.

(2) At least five (5) rental units.

(3) An association.

(4) A condominium, cooperative, or other form of horizontal property.

(5) A subdivision or an addition.

(6) A conservancy district.

(7) A campground.

(8) A mobile home park.

(9) A club that has, as a purpose, the use of public waters for boating, fishing, hunting, trapping, or similar activities. (*Natural Resources Commission; 312 IAC 6-2-3.7*)

312 IAC 6-4-1 Applicability

Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-29-1-8

Affected: IC 14-29-1

Sec. 1. (a) This rule establishes standards for the placement or maintenance of a **pier, including a marina or a group pier, along or within the ordinary high watermark of a navigable waterway.**

(b) This rule is administered by the division of water and the division of law enforcement of the department. (*Natural Resources Commission; 312 IAC 6-4-1; filed Sep 11, 1997, 8:50 a.m.: 21 IR 369; readopted filed Jul 28, 2003, 12:00 p.m.: 27 IR 286*)

312 IAC 6-4-2 Individual licensure of marinas

Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-29-1-8

Affected: IC 14-29-1-8

Sec. 2. (a) **Except as provided in subsection (c), a person must not place a marina which is a permanent structure along or within the ordinary high watermark of a navigable waterway unless a written license is required obtained from the department to place a new marina along a navigable waterway by which the person agrees to operate the marina under section 3 of this rule.**

(b) A license issued under subsection (a) satisfies IC 14-29-1-8 and IC 14-15-7-3.

(c) **A separate license is not required under this section, if a license is issued for a group pier under section 4 of this rule, and the person who seeks the license for the group pier agrees to satisfy the requirements for pumpout facilities in section 3 of this rule.**

(*Natural Resources Commission; 312 IAC 6-4-2; filed Sep 11, 1997, 8:50 a.m.: 21 IR 369; readopted filed Jul 28, 2003, 12:00 p.m.: 27 IR 286*)

312 IAC 6-4-3 Sewage pumpout facilities for watercraft at a marina

Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-29-1-8

Affected: IC 14-29-1-8

Sec. 3. (a) Except as provided in subsection (c), a person must not operate a marina unless the person:

(1) provides a pumpout that is in good working order and readily accessible to patrons of the marina; and

(2) secures and maintains one (1) of the following:

(1) ~~(A)~~ (A) a license under 327 IAC 3-2 for the construction and operation of a wastewater treatment facility or sanitary sewer;

(2) ~~(B)~~ (B) a license under 410 IAC 6-10 for the construction of a commercial on-site wastewater disposal facility; **or**

(3) ~~(C)~~ (C) an alternative written approval for wastewater disposal from an authorized governmental agency.

(b) The department shall require compliance with subsection (a) as a condition for the issuance of a license under section 2 of this rule.

(c) A person may apply to the division of law enforcement for an exemption from this section. The exemption shall be granted, for a period not to exceed five (5) years, where the person demonstrates either of the following:

(1) The marina is designed to serve exclusively ~~watercraft~~ **boats** that are neither required nor likely to be equipped with a marine sanitation device.

(2) The operator of the marina has entered a binding agreement with another marina or similar facility along the waterway to provide pumpout services where the other marina or similar facility:

(A) maintains a lawful pumpout as described in subsection (a);

(B) is in proximity to the marina seeking the exemption so patrons to be served at a pumpout, which would otherwise be required at the exempted marina, would not be significantly inconvenienced; and

(C) has sufficient pumpout capacity and accessibility to effectively serve the patrons of both parties to the agreement.

(Natural Resources Commission; 312 IAC 6-4-3; filed Sep 11, 1997, 8:50 a.m.: 21 IR 369; readopted filed Jul 28, 2003, 12:00 p.m.: 27 IR 286; filed Jul 22, 2004, 10:05 a.m.: 27 IR 3885)

312 IAC 6-4-4 Individual licensure of group piers

Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-29-1-8

Affected: IC 14-15; IC 14-26-2

Sec. 4. (a) A person must not place a group pier along or within the ordinary high watermark of a navigable waterway unless the person obtains a written license from the department under this section.

(b) The applicant must demonstrate exercise of the license would not do any of the following:

- (1) Unreasonably impair the navigability of the waterway.**
- (2) Cause significant harm to the environment.**
- (3) Pose an unreasonable hazard to life or property.**
- (4) Violate the public trust.**
- (5) Interfere in the reasonable exercise of boating operations by the public.**
- (6) Interfere in the interests of a landowner having property rights abutting the lake or rights to access the lake.**

(c) The department shall condition a license for a group pier so the placement, configuration, and maintenance of the pier:

(1) Provide a reasonable buffer zone between the pier and

(A) the channel where boats are commonly operated in excess of ten (10) miles per hour; and

(B) the riparian zone of adjacent property owners to provide for reasonable navigation by the adjacent property owner and by the public. Except as otherwise provided in this clause, ten (10) feet of clearance on both sides of a riparian line (for a total of twenty (20) feet) is preferred, and a minimum of five (5) feet of clearance on both sides of a riparian line (for a total of ten (10) feet) is required. The department may approve an exception where adjacent riparian owners use a common pier along their mutual property line, and the purposes of this clause are satisfied by waters elsewhere within their riparian zones.

(2) Do not result in unreasonable traffic congestion either:

(A) in the immediate vicinity of the pier; or

(B) to impair the carrying capacity of the navigable waterway where the department has determined the carrying capacity in an analysis which is published before the license application is filed.

(3) Do not authorize structures which are likely to be hidden or obscured so as to pose a hazard to the public.

(4) Minimize disturbances to vegetation and sediments between the ordinary high watermark and adjacent shallow waters.

(5) Are unlikely to trap debris or redirect sediments or currents to cause erosion or sedimentation that is detrimental to navigation or to the property rights of other riparian owners.

(6) Avoid causing or appearing to cause appropriations of public water unnecessary to the reasonable exercise of riparian rights. A pier must not extend more than one-half (1/2) the width of the applicant's shoreline. As used in this subdivision, "width" is determined by the straight line formed between the points located at intersections of the applicant's property lines with the shoreline. (*Natural Resources Commission; 312 IAC 6-4-4*)

312 IAC 6-4-5 General licenses for qualified piers

Authority: IC 14-10-2-4; IC 14-15-7-3; IC 14-29-1-8

Affected: IC 14-15; IC 14-26-2

Sec. 5. (a) The placement and maintenance of a pier is authorized without a written license issued by the department under IC 14-29-1 and this rule if the pier qualifies under this section.

(b) In order for a pier to qualify, the structure must satisfy each of the following:

(1) Not infringe on the access of an adjacent landowner to the navigable waterway.

(2) Not unduly restrict navigation.

(3) Not exceed the lesser of the following:

(A) One hundred (100) feet long.

(B) One-quarter (1/4) of the width of the waterway.

(4) Not be unusually wide or long relative to similar structures within the vicinity on the same navigable waterway.

(5) Not be a marina.

(6) Not be a group pier.

(7) Be placed by a riparian owner or with the written approval of a riparian owner.

(c) A pier placed along or within the ordinary high watermark of Lake Michigan must also comply with 312 IAC 11-7 or 312 IAC 11-8.

(d) A pier placed along or within the ordinary high watermark of any of the following lakes:

(1) Brookville Lake in Franklin County and Union County.

(2) Cagles Mill Lake in Putnam County and Owen County.

(3) Cecil M. Harden Lake in Parke County.

(4) Mississinewa Lake in Miami County, Wabash County, and Grant County.

(5) Lake Monroe in Monroe County, Brown County, and Lawrence County.

(6) Patoka Lake in Dubois County, Orange County, and Crawford County.

(7) J. Edward Roush Lake in Huntington County.

must, in addition to this article, satisfy any requirement otherwise applicable to a property that is owned or leased by the state and managed by a division of the department.

(e) A pier is exempted from licensure under this rule and IC 14-29-1 if placed along or within the ordinary high watermark of either of the following:

(1) Lake Freeman in Carroll County and White County.

(2) Lake Shafer in White County. (*Natural Resources Commission; 312 IAC 6-4-5*)